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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 788

THE STANDARD OIL COMPANY OF KANSAS,
Petitioner,

v.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

J. GILMER KORNER, JR.,
Counsel for Petitioner.

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At page fourteen, the instant petition, by reference, adopts pages 110 to 135 of the Record, and incorporates the same as a part of the petition. Said pages 110 to 135 constitute the argument presented to the Court below in support of its Plea to the Jurisdiction.

For the convenience of this Court, the following page References are given to that portion of the Record:

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THE STANDARD OIL COMPANY OF KANSAS, *Petitioner,*

v.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

The Standard Oil Company of Kansas prays that a Writ of Certiorari issue to review the judgment of the Court of Claims, entered in the above cause on October 5, 1942, and the Order of that Court entered December 7, 1942, overruling plaintiff's motion for a new trial in said cause.

Opinion Below.

The opinions of the Judges of the Court of Claims (R. 93-109) are not yet officially reported.

Jurisdiction.

The jurisdiction of this Court is invoked under section 3, Ch. 229, Act of February 13, 1925, 43 Stat. 939, 28 U. S. C. section 288.

Questions Presented.

1. The Court below found that one H. G. Lea attempted to perpetrate a fraud in causing to be filed, in the Bureau of Internal Revenue, certain minutes of the plaintiff company, which he (H. G. Lea) knew had been altered. Such act was without the knowledge of the plaintiff. The minutes were promptly questioned by Bureau officials and the question of their validity was immediately brought to plaintiff's attention. Plaintiff immediately disclaimed the said minutes, made an exhaustive investigation relative thereto, requested the Treasury Department to make an investigation —which was done. The investigations were inconclusive as to how, when, or by whom, or under what circumstances the minutes were altered. At no time subsequent to the raising of the question as to the minutes did plaintiff rely upon the said minutes in any way. After completion of the investigations the Chief Counsel reopened the matter, heard and considered all the facts relative to the case, and ruled that plaintiff's refund claims should be allowed. Thereafter, without reference to the questioned minutes, the Commissioner of Internal Revenue rejected plaintiff's claims. In due time plaintiff brought suit in the Court of Claims. At no time or place in its suit did plaintiff rely upon said minutes or offer them in connection with its claims. At no time did plaintiff, or any person connected with plaintiff, practice or attempt to practice any fraud against the United States in the proof, establishment, or allowance of its claim, in the Court of Claims.

The question is whether the Court of Claims had jurisdiction to enter judgment of forfeiture under the provisions of section 279, Title 28, U. S. C., when no act complained of was in connection with the suit or action in the Court of Claims, and when there is no contention that the claim was false, fictitious, or fraudulent.

2. In the decision below, two judges held that one H. G. Lea committed a forgery in respect of plaintiff's minutes. That finding is based upon conclusions and inferences amounting to no more than a preponderance in the weight of the evidence. One Judge concurred in the result but admits the difficulty of identifying Lea as the one responsible and states that while the finger points strongly to him, it does not rise to the dignity of a charge nor sink to the level of mere suspicion. Two judges dissented on the ground that no fraud had been proved by the rule of evidence universally required in cases of this character; that the allegations of fraud had been supported only by presumption, suspicions, and contradictory circumstantial evidence.

The question is whether Lea can be properly convicted of forgery under such circumstances, and thereupon to sustain a decision that the plaintiff company was guilty of corruption and fraud within the meaning of section 279, Title 28, U. S. C.

Statutes Involved.

The statutes involved are set out in the Appendix, *infra*, p. 29.

Statement.

The facts, as found by the Court below (R. 60-93), are substantially as follows:

Plaintiff is a Delaware corporation organized in 1932 to succeed a predecessor company of the same name hereinafter referred to as the "Kansas Company." The Kansas Company had, over a period of many years, installed Burton Stills for cracking gasoline. However, shortly prior to 1929 improved types of equipment had come into use, and a new type of gasoline had come into use. The Burton Stills were not adapted to the production of this new type of gasoline.

The Kansas Company's officials made exhaustive investigations to determine if the Burton Stills could be adapted so as to render them commercially capable of use in the Company's business. The subject of the obsoleteness of these stills was discussed on many occasions by the directors and officers, although no formal action was taken by the Board. In filing its tax returns to the State of Kansas in 1929 the Kansas Company deducted the value of Burton Still batteries #5, 6, 7, 11 and 12, with the explanation that they represented obsolete equipment.

In November 1932, the Kansas Company was succeeded in reorganization by the plaintiff (Delaware Company). An exhaustive audit of the Kansas Company (covering several months) was made during 1932 by Arthur Young & Co., an accounting firm. The representative of that firm discussed the matter of the Burton Stills obsolescence with the officers and directors of the Kansas Company and, upon information supplied by them, he prepared an audit report and adjusting entries for the writing off of the Burton Stills as obsolete, with the explanation that they had been abandoned as obsolete in 1929. Amended Income Tax Returns for 1929 and 1930 were then prepared setting forth, *inter alia*, the adjustments for obsolescence, and a copy of the Arthur Young & Co. Report was attached thereto as a schedule. At the same time, Refund Claims were filed, which made reference to the said Amended Income Tax Returns. The said amended returns and refund claims were signed and verified by an officer of the Kansas Company.

As a result of events which took place in the change of control of the Kansas Company and its succession by plaintiff, bitter feelings and personal animosity arose between the officers of the old company and the officers of the new, in particular between Messrs. Hopkins and Warren on one side and Mr. C. B. Wrightsman on the other.

The Refund Claims for 1929 and 1930 were examined by the Commissioner of Internal Revenue after investigations conducted by revenue agents, and by Bureau engineers, who discussed the issue of obsolescence with the men who had been the officials of the Kansas Company in 1929 and 1930. As a result of his examination the Commissioner prepared the claims for allowance and prepared certificates of overassessment for that purpose. Under routine procedure these were referred, in May 1934, to the Review Division of the Chief Counsel's office, for review.

From May to September 1934, Mr. Wrightsman, President of plaintiff, made occasional inquiries as to status and explained that he was unfamiliar with the details of the matter and was unable to discuss the matter on its merits, but was merely seeking to expedite action. In September 1934, he was told by the Review Division that contemporaneous evidence in the form of corporate minutes were lacking, and he was requested to supply the same. Wrightsman telephoned to Lea in Texas and asked Lea if the minutes contained any authorization for a charge-off of the Burton Stills. Lea said that so far as he knew they did not, but that it was not important anyway since the governing statute did not require such action in order to support the claimed deductions.

The Review Division, at Wrightsman's request, confirmed by letter of Sept. 27, 1934, its request for minutes. Wrightsman requested Lea to secure the necessary information for an appropriate reply. Lea went to Kansas and interviewed former officials of the Kansas Company, examined documents and records, and furnished the information he had received to Mr. Peddy (plaintiff's general counsel in Houston, Texas) who, on the basis of the information so furnished him, prepared a letter to the Bureau. That letter was prepared for the signature of Wrightsman who was then in New York. It was sent to Wrightsman who

signed it and delivered it to the Chief Counsel. The contents of that letter are at R. 69-70. Attached to the letter was a document signed by Lea setting forth that the minute books of the Company contained a certain minute of January 7, 1930, making reference to the Burton Stills (R. 71). Wrightsman advised the Bureau that the former officials of the Kansas Company had told him they would make affidavits bearing on the matter (R. 71-72).

Plaintiff's offices were at Houston, Texas. The former officials of the Kansas Company were at Neodesha, Kansas. Lea proceeded to Kansas and interviewed certain of those officials who were extremely hostile to Wrightsman. After some delay those men executed affidavits which appear at R. 72-74. Another former director (Metcalf) executed a similar affidavit except that he omitted reference to any corporate minute (R. 74). Another director (Evans) who had been general counsel for the Kansas Company, made a more lengthy affidavit (R. 74-76). All of these affidavits were to the effect that the officers and directors of the Kansas Company had discussed the matter of the obsolescence of the Burton Stills in 1929 and that they had concluded in 1929 that they were obsolete, and that they had been charged off on the Tax Returns to the State of Kansas.

The said affidavits (with certain others to the same general effect) were forwarded to the Chief Counsel.

In December 1934, the Chief Counsel advised by letter that the evidence was incomplete and that a conference would be held. At that conference the point was made that the minute (of Jan. 7, 1930) referred to in the affidavits was not conclusive and that the claims would be rejected unless contemporaneous evidence was produced. Lea stated that he had not found any contemporaneous minute.

Plaintiff retained Washington counsel who, at an informal conference the following day, suggested that the Bureau attorneys make a personal investigation of the Company's books and records in order to satisfy themselves. The Bureau attorneys indicated that this might be done, but it was not done (R. 78). Meanwhile, plaintiff's representatives agreed to make a further search of records and minute books to see if any contemporaneous evidence, of the character mentioned by the Bureau attorneys, existed.

Plaintiff then likewise retained Judge Evans (the former general counsel and director of the Kansas Company) and he proceeded with the task of securing additional affidavits from former officials of the Kansas Company, bearing on the point of obsolescence.

During that month a representative of Arthur Young & Co. was making the annual audit of plaintiff's books at Houston, Texas, and on Lea's return to Houston he requested that representative to examine the minute books of the Kansas Company to see if a minute existed making reference to the subject matter of the obsolescence of the Burton Stills. Shortly thereafter the accountant called Lea's attention to a resolution of May 22, 1929, which appears at R. 79. Later, that accountant and the former accountant who had made the examination and report in 1932, compared their notes and found that the former accountant's notes did not make reference to the last part reading "and that Nos. 5, 6, 7, 11 and 12 Batteries be discarded and abandoned as obsolete.' This fact was not called to the attention of plaintiff's officers by either of the accountants (R. 79).

Lea forwarded a photostat copy of the said minute to Washington counsel, who filed it, accompanied by a brief, in the Bureau.

In the meantime, counsel were engaged in collecting additional evidence. Hopkins and Warren declined to sign

revised affidavits relative to the May 22, 1929, minute. They told Judge Evans then, and testified at the hearing in this case, that the officers and directors did conclude in 1929 that the Burton Stills were obsolete but they raised a question as to whether that fact had been recorded in a minute. Wrightsman took no part in this work and the objections of Hopkins and Warren to signing the affidavits were in general made known to Wrightsman, but he attributed their objections to their hostility to him, and did not realize that the authenticity of the resolutions was being seriously questioned (R. 83).

In the meantime additional affidavits were secured from directors and others who attended the Board meetings of the Kansas Company, setting out facts why they considered the stills obsolete in 1929. Among these were affidavits from Judge Evans, Curtis Henderson, technical adviser to the Company, and others (R. 83-84).

The matter came on for a conference in the Review Division on March 8, 1935. Plaintiff sent the minute book to Washington for submission at that conference. In the course of the conference Government attorneys called attention to the fact that the pages of the pertinent minutes were typed on paper bearing different marks, and that the typing appeared to be different. Lea expressed surprise and stated that he was unable to explain this. He explained how the minutes had been brought to his attention.

Plaintiff's counsel urged that the case be considered without any reference to the minutes. The conference ended without any decision being made. The following day plaintiff's counsel requested the Bureau to suspend further action until an investigation could be made.

Two days later Wrightsman learned of this for the first time from plaintiff's counsel and was both surprised and shocked at the information, and gave instructions that

everything possible be done to find out if the minutes had been altered and, if so, by whom (R. 87). Wrightsman and plaintiff's attorneys proceeded vigorously with an investigation of the whole matter, and employed a documentary expert who made a preliminary report in which he concluded that the minutes had been altered. The suspicions of Wrightsman and Peddy were directed at Lea. Peddy, an experienced prosecuting attorney, undertook to secure a confession from Lea, but was unsuccessful, Lea insisting throughout on his innocence (R. 87-88).

Shortly thereafter plaintiff's counsel, including Peddy, submitted to the Bureau officials all of the data (including the report of the documentary expert) and the information elicited by their investigations, and explained in detail the efforts made in that investigation. They advised the Bureau officials that they were unable to arrive at a definite conclusion, and requested that the Special Intelligence Unit of the Treasury Department make an investigation of the whole matter (R. 88). Such an investigation was made, covering a period of several months. The plaintiff cooperated in every possible way and made all its books and records available to the examining agent. After that extended investigation the Special Intelligence Unit's Agent reported that he was unable to fix responsibility for the alteration of the minutes (R. 88-89).

In the meantime the Commissioner advised plaintiff that it was proposed to disallow the claims (R. 89-91) and two months later advised that they were disallowed. In neither of said letters was any reference made to the questioned minutes, nor did the Commissioner at any time advise that the claims were rejected because of the presentation of such minutes (R. 91).

About two years later, when plaintiff learned that the Special Intelligence Unit had completed its investigation without being able to fix responsibility for alteration of

minutes, plaintiff made application that its case be reopened and reconsidered on its merits (R. 91). That was done and a hearing was had before the Chief Counsel's Committee. At that hearing plaintiff presented in detail what had occurred with respect to the investigation of the questioned minutes and other matters relative thereto, and stated that it was not relying on the minutes to support its claims, but that it was contending that its claims were allowable without regard to what minutes might, or might not, have been adopted. The case was then heard on its merits. A proposal of settlement was made on the basis of an allowance of an amount slightly less than $75,000 (R. 92).

The Chief Counsel's Committee recommended the allowance of the claims for said amount, and the Chief Counsel issued instructions to the Bureau for the allowance of the 1929 claim in the amount of $74,000. While these instructions were being carried out, and the appropriate certificates of overassessment were being prepared, the Chief Counsel's instructions were revoked and the claims were not paid (R. 92).

From the time when the minutes were first questioned on March 8, 1935, and at all times since, the plaintiff, through its President, Mr. Wrightsman, its General Counsel and Director, Mr. Peddy, and its counsel, has cooperated with the Bureau of Internal Revenue and the Commissioner of Internal Revenue and his subordinates, in an endeavor to ascertain the facts relative to the questioned minutes and to ascertain when and by whom the minutes were written or rewritten; and prior to the investigations conducted by the Bureau of Internal Revenue, as well as during the conduct of the investigations, the plaintiff voluntarily brought to the attention of, and voluntarily delivered to, the Bureau and its investigators all

of its files and all of its resources in an endeavor to assist the Bureau in its investigations (R. 92).

In due course plaintiff brought suit in the Court of Claims. Defendant pleaded general traverse and the cause stood thus at issue (R. 40). About two and one-half years later, defendant filed special answer and plea of fraud and therein alleged that while its claims were *pending in the Treasury Department,* the plaintiff *submitted to the Treasury Department* the minutes in question for the purpose of influencing the Treasury Department, and that such action constituted a violation of sec. 172 of the Judicial Code (U. S. C. sec. 279, Title 28) (R. 40).

On defendant's motion, the Court below, on May 13, 1940, ordered that the issue of fraud be separated from the merits of the case, and that that issue be first heard (R. 60).

The case was accordingly heard and testimony taken. At no time in this cause has plaintiff invoked or relied upon the questioned minutes.

On October 5, 1942, the Court below entered special findings of fact and conclusions of law; Opinion by Judge Madden in which Judge Whitaker concurred; Opinion by Judge Jones; dissenting Opinion by Chief Justice Whaley in which Judge Littleton concurred. On the same day the judgment of the Court was entered in which it was stated, as a conclusion of law, that plaintiff corruptly attempted to practice, and practiced, fraud against the United States in the proof or establishment of its claim against the United States, and that its claim is forfeited to the United States.

On November 3, 1942, plaintiff filed motion for a new trial. That motion was denied on December 7, 1942.

On January 5, 1943, plaintiff, by leave of Court, filed objections and plea to the jurisdiction of the Court on the

ground that the Court of Claims is without jurisdiction to enter a judgment of forfeiture, within section 279, Title 28, U. S. C., upon defendant's plea, and upon the facts in this case. The Court overruled the objection and plea on January 6, 1943, without comment.

Specification of Errors to Be Urged.

1. The Court below erred in ordering that plaintiff's claims be forfeited, for the reason that the statutes do not confer jurisdiction on the Court of Claims to forfeit a claim for refund of taxes, under sec. 279, Title 28, U. S. C., where the defendant's plea, and the evidence adduced in support thereof, show that the alleged fraudulent attempt was committed in an Executive Department of the Government, and that it was not attempted in the Court of Claims or in connection with any action in the Court of Claims.

2. The Court below erred in holding H. G. Lea guilty of forgery, upon proof which, as appears from the findings and opinions themselves, is not beyond a reasonable doubt, —which degree of proof is universally required to support a conviction of forgery.

3. The Court below erred in holding that H. G. Lea was guilty of forgery, and that this plaintiff's claims are forfeited thereby, upon which proof which the opinions of the Court below clearly demonstrate is no more than a mere preponderance of evidence.

4. The Court below erred in purporting to lay down a rule which is without support in law and which involves a principle of law which is of general public interest and public policy.

5. The Court below erred in purportng to lay down a rule which is in conflict with applicable decisions of the Supreme Court, and in conflict with the decisions of vari-

ous Circuit Courts of Appeals, and in so doing has departed from the accepted course of judicial proceedings.

6. The Court below erred in failing and refusing to overrule and dismiss defendant's special answer and plea of fraud.

7. The Court below erred in failing to find for plaintiff on the issue raised by defendant's special answer and plea of fraud.

8. The Court below erred in ordering and adjudging that plaintiff's claim be forfeited to the United States.

9. The Court below erred in overruling plaintiff's motion for a new trial.

Reasons for Granting the Writ.

I.

The Court of Claims is without jurisdiction to enter a judgment of forfeiture in this case. The statutes do not confer jurisdiction on the Court of Claims to forfeit a claim for the refund of an income tax where the alleged fraud was committed in an Executive Department.

Defendant pleaded a general traverse and then, about two and one-half years later, on December 13, 1939, filed a special answer and plea of fraud. Therein, defendant specifically pleaded that the filing of the allegedly altered minutes took place in the Treasury Department; and it was further alleged that the minutes were filed for the purpose of influencing a decision in the Treasury Department (R. 40). Defendant specifically pleaded sec. 172 of the Judicial Code (U. S. C. sec. 279, Title 28). Defendant's entire case was devoted to the attempt to prove that the minutes had been filed in the Treasury Department, with the knowledge on the part of H. G. Lea that they had been altered. Defendant

was unable to persuade the Court below that any other person connected with the plaintiff had such knowledge. The majority of the Court below sustained defendant's plea and a judgment of forfeiture was entered.

Plaintiff repeatedly objected and pleaded to the Court's jurisdiction (R. 110-111) but the point was not referred to in the Court's findings or decision or opinions. After judgment, and with leave of Court, plaintiff renewed its plea to the jurisdiction (R. 110) but that plea was overruled by the Court without comment (R. 136).

This situation brings into focus the precise question as to whether the Court of Claims has jurisdiction under sec. 279 to order a forfeiture of plaintiff's claim under the facts in this case.

The construction of sec. 279 raises an important question of federal law,—one which has never been passed upon by this Court. The writ prayed for herein should be granted. *Spies* v. *United States*, — U. S. — (11 L. W. 4104). Certiorari should be granted because of the importance of the question in the administration of justice and the administration of refunds of federal taxes generally, *Harrison* v. *Northern Trust Co.*, — U. S. — (11 L. W. 4110). The burden rested on defendant to allege and prove a defense and plea within the jurisdiction of the Court of Claims. Defendant's special answer and plea of fraud fails to state a cause of action within the jurisdiction of that Court. "As the want of jurisdiction is of the subject matter, it may be considered and appropriate judgment given at any stage of the proceedings, either here or below." *Matson Navigation Co.* v. *United States*, 284 U. S. 352, 359.

At pages 110 to 135 of the Record herewith, there are set forth the reasons advanced to the Court below by the plaintiff in support of its plea to that Court's jurisdiction. In the interest of brevity, and to avoid unnecessary repeti-

tion, plaintiff, by reference thereto, incorporates the above mentioned pages of this Record in, and as a part of, its instant petition for certiorari, and respectfully invites the attention of this Court thereto.

In addition thereto, plaintiff respectfully presents the following:

In *Williams* v. *United States,* 289 U. S. 553, this Court exhaustively reviewed the character of the Court of Claims. That decision held (1) that sec. 1, Article 3, of the Constitution does not apply to the Court of Claims, and that it is not a constitutional court; (2) that the provisions of sec. 2, Article 3, of the Constitution wherein it is stated that "The Judicial Power shall extend * * * to controversies to which the United States shall be a party," does not apply to the Court of Claims. It decided that although the Court of Claims exercises judicial power, it is nevertheless not the judicial power defined by Article 3, of the Constitution. This Court made it clear that the Court of Claims does not have general jurisdiction and can exercise only that jurisdiction which is specifically given to it. See especially pages 579 to 581 of that decision.

The Court of Claims was never granted powers which had been specifically and exclusively granted to the Constitutional Courts of general jurisdiction. Jurisdiction to punish frauds practiced or attempted in the Executive Departments was specifically conferred on courts of general jurisdiction. At a later date (and by specific enactment, sec. 280, *supra*) Congress provided that the Court of Claims should disallow any person's claim for stores and supplies, where the *claim* was knowingly excessive and fraudulent in amount.

The Court of Claims, being a tribunal of strictly limited jurisdiction, cannot assume or exercise any power not clearly and specifically conferred upon it. If a court is a

constitutional court, it will be presumed that it has general jurisdiction and the statute creating it will be so construed. However, where the court is a legislative tribunal with limited powers, no jurisdiction can be exercised by it other than that clearly and unambiguously granted to it. As was stated in *Matson Navigation Co., supra,* "We think it clear that the Act did not purport to enlarge existing remedies or establish a new procedure for the enforcement" of punishments against persons committing offenses in the Executive Department. Jurisdiction over such an offense is specifically given to courts having general jurisdiction. It is not specifically given to the Court of Claims. Without such specific authority being given, a legislative tribunal of limited powers cannot assume that it has such jurisdiction, —and particularly so when that jurisdiction is specifically granted to other courts. It is not the function of the courts to engraft on a statute additions which it might be thought the legislature logically might or should have made. *United States* v. *Cooper Corp.,* 312 U. S. 600, 605.

What has been said is universally true, but its application is all the more imperative where forfeitures are concerned. Forfeitures are not favored and should be enforced only when within both the letter and the spirit of the law. A measure requiring absolute forfeiture should be "expressed in language sufficiently plain *to admit no reasonable doubt.*" *United States* v. *One Ford,* 307 U. S. 219, bot. 235. Forfeiture acts are exceedingly drastic and it would require unclouded language to compel the conclusion that Congress intended measures not demanded by the circumstances or pointed out in the reports of its committees. *Ibid.,* 236-237.

Even though it might be argued that the language of sec. 279 is sufficiently clear on a casual reading, *that is not enough.* As was aptly stated by this Court a month ago

in *Harrison* v. *Northern Trust Co.*, — U. S. — (11 L. W. 4110):

> "But words are inexact tools at best and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history *no matter how 'clear the words may appear on superficial examination.'* " (Italics supplied.)

The same thought was expressed in *United States* v. *American Trucking Assn.*, 310 U. S. 534, 542-544, where this Court, in speaking of statutory construction, said:

> "To find their content, they must be viewed in their setting. * * * It [interpretation] is to construe the language so as to give effect to the intent of Congress. * * * Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' * * * A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, 'excepting as a different purpose is plainly shown.' "

The foregoing is apt because the companion acts of March 2 and March 3, 1863, were in pari materia. A legislative plan was being formulated. The two acts are, in a real sense, complementary. The legislative history of one involves a study of the legislative history of the other. *We have traced that history at pages 113 to 127 of the instant Record and respectfully invite the Court's attention thereto.*

About a month ago this Court had occasion to study the legislative history of one of those Acts (March 2, 1863) in

the case of *Marcus* v. *Hess*, —— U. S. —— (11 L. W. 4141). There the Court was construing the forfeiture provisions enacted on March 2, 1863. That was the Act which specifically provides the punishment for forging, counterfeiting, or uttering or using the same *in any department of the Government*, and which specifically provided that jurisdiction of such cases should repose exclusively in the several District Courts, etc., having general jurisdiction (see R. 115-117). That statute later became sections 5438 and 3490 (31 U. S. C. sections 231-234). (See R. 122-123.)

In approaching the construction of that Act, this Court (in *Marcus* v. *Hess, supra*) said: "Sound rules of statutory interpretation exist to discover and not to direct the Congressional will. * * * we must give it careful scrutiny lest those be brought within its reach who are not clearly included."

The Court there found that defendant had pleaded *nolo contendere* to an indictment charging them with conspiring corruptly and fraudulently to present a false claim for payment knowing the claim to be fraudulent. That claim was presented, through intermediate channels, to the United States for payment. The Court held that the punishment on the criminal charge did not relieve them from the *qui tam* action for forfeitures.

Now suppose there had been no fraud in the claim and that it was bona fide, but, in the intermediate channels, improper influence had been attempted to secure payment. Would the Court of Claims have jurisdiction to forfeit the claim under sec. 279? Assuredly not. In such case, the action would have been in the District Court either under the criminal section or under the *qui tam* section, or both. However, the Court of Claims might have refused to allow the claim under sec. 280, *but only* on the ground that the

claim itself was fraudulent and excessive. The Court of Claims could not have forfeited it because of any improper attempt to influence the allowance in the Executive Department, of a bona fide and just claim.

The instant section (sec. 279) like the one considered in the *Marcus case*, has been on the statute books unchanged for about 80 years. In all that time it has never been applied by the Court of Claims as the instant defendant now contends it should be applied.

During these 80 years sec. 279 has been invoked by defendant ten times, so far as our search has disclosed. In not one single instance has the construction been put upon this section, which defendant now contends should be put upon it.

As was demonstrated to the Court below, in not one single case has the Court of Claims rendered a decision of forfeiture under sec. 279 except, (1) where the claim was tainted with fraud *ab initio*, and hence fraudulent *per se*, and hence a suit on such a claim was a fraud in the presence of the Court of Claims, or (2) where the fraud or attempted fraud in the proof or establishment of the claim was in the presence of the Court. In not one single instance has this Court decided to forfeit a claim under sec. 279 where the claim was bona fide and the attempted fraud in proof was in an Executive Department.

An examination of the cases proves this:

In *Furay's* case, 34 C. Cls. 171, the claim was for an excessive and non-existent liability. The fraud was an integral and inherent part of the claim itself. And the Government's brief in that case (p. 11) specifically so argued and contended that *since it was the claim which was fraudulent per se, the fraud was committed in the presence of the Court.* The *Furay case* was a simon-pure case of a claim

which was false *ab initio*. That case did not present a question as to a fraud committed in an Executive Department.

In *Blume's case*, 81 C. Cls. 210, the converse was true. There the claim was presumably bona fide, but claimant attempted to practice a fraud in the "action" on that claim in the Court of Claims. In that case there was no suggestion that the fraud had taken place in an Executive Department.

The *Jerman case*, —— C. Cls. ——, does not support defendant's position and is not in point for the same reason that *Furay's case* is not in point. In the *Jerman case* the *claim itself* was fraudulently excessive due to a conspiracy between the plaintiff and Jaggers, the hay inspector. Jaggers and/or the plaintiff knowingly and wilfully raised the grades of hay on the bills of lading and invoices after correct inspection certificate had been made out. As a result, the *claim itself* was false, fictitious and fraudulent. That case did not present the question of a fraud committed in the Executive Department. The claim in that case was fictitious and fraudulent *per se* and the suit on that claim, and the presentation thereof, was a fraud on the Court and in the presence of the Court. This Court had authority in that case either to forfeit the claim under sec. 279 or deny and disallow the claim under sec. 280. The defendant was ambiguous in the plea but the result of the decision was the same.

The *Jerman case* has no bearing whatsoever on the issue in this case. It is not a matter of distinguishing that case. That case was decided on a state of facts totally different from the instant case, *and the basis for the decision in that case does not even exist in the instant case.*

In the other seven cases in which defendant pleaded sec. 279, the fraud was allegedly committed in an Executive Department. In those cases the Court below did not decide

the instant issue, but overruled defendants' plea in each case on the ground that fraud had not been proved.

Terrill v. *United States*, 35 C. Cls. 218 (1900);

New York Market Gardeners Assn. v. *United States*, 43 C. Cls. 114 (1908);

Colorado Anthracite Co. v. *United States*, 45 C. Cls. 614 (1909), affirmed 225 U. S. 219 (1912);

Int. & Great Northern Ry. Co. v. *United States*, 57 C. Cls. 328 (1922);

Carroll v. *United States*, 76 C. Cls. 103 (1932);

Baird v. *United States*, 76 C. Cls. 599 (1933).

In one other case the Court below made it clear that its jurisdiction is confined to frauds before it,—as the instant plaintiff contends. That case is *Globe Works* v. *United States*, 45 C. Cls. 497 (1910). In that case the Court quoted sec. 279 and said:

> "But the court is not concerned with the power that Congress have exercised in the passage of the act conferring jurisdiction [a special enabling act] * * * except as the conduct of the parties under the act as it now exists has relation to the requirements of the law *in the prosecution of the claim before this court* under the provisions of section 1086 R. S. [sec. 279 U. S. C.] * * *
>
> "While it is true that forfeitures in the law are not favored, nevertheless the Congress have provided for them, *if in this court there be an attempt* by a claimant to practice any fraud against the Government in the 'proof, statement, establishment, or allowance of any claim or any part of any claim.'" (top p. 504, mid. p. 507)

The foregoing language would seem to make clear the view of the Court of Claims that its jurisdiction, to order a forfeiture, is limited to frauds attempted in that Court.

The *Globe case* was held for a long period on the Docket of the Court and thereafter the plaintiff presented its proof in support of the merits of its claim, and the defendant apparently developed its plea of fraud and forfeiture. In its later decision in 1918 (53 C. Cls. 532) the Court decided the claim on its merits, adversely to the plaintiff, and closed its opinion with the following statement:

> "There is another important question presented in this case as the basis of a request by the defendant that the court adjudge a forfeiture of the claim under section 172 of the Judicial Code. We have found facts with reference thereto, but the conclusions already reached, adverse to the plaintiff, seem to render it unnecessary at this time to determine this question."

Plaintiff is not here contending against a long and settled construction. Plaintiff is resisting an entirely new construction now sought by the Government to be put upon the statute. As noted, this statute is 80 years old. The interpretation now sought by the Government has never been put upon it. On the contrary, the Court plainly indicated in *The Globe case, supra,* that such is not the proper construction, and should not be put upon it.

Plaintiff respectfully submits that the instant issue involves an important question which should be decided by the Supreme Court.

II

The Court below has held Lea guilty of a felony (forgery) and has attributed his crime to this plaintiff, and has held that this plaintiff perpetrated a fraud which worked a forfeiture of its claims. An examination of the opinions of the Court below discloses that the conviction of Lea of forgery and the decision that, by reason thereof, this plaintiff corruptly practiced a fraud, were predicated upon a conclu-

sion based upon an assumption of a preponderance of evidence.

A charge of fraud is not lightly to be sustained but must be *strictly* proved by clear, cogent and convincing proof. It is axiomatic also that forgery cannot be found except upon proof which is beyond a reasonable doubt. It is equally axiomatic that fraud is odious and is never presumed, and should never be presumed. *Gregg* v. *Lessee of Sayre,* 8 Pet. 244, mid. 253. It is also axiomatic that there can be no assumption or presumption that an act has been done, for which the law imposes a penalty. *Taylor on Evidence,* 10th Ed. sec. 112; *Jones on Evidence,* secs. 12, 14.

Defendant, having asserted fraud, is charged with the burden of proving it strictly and by more than a preponderance of evidence. The evidence must be clear and convincing. *Lalone* v. *United States,* 164 U. S. 255; *National City Bank,* 35 B. T. A. 975, 988, *aff'd* 98 F. (2d) 93; *Budd* v. *Com'r,* 43 F. (2d) 509.

A charge of fraud against the Government is never presumed and must be proved by clear and convincing evidence. *Taplin* v. *Com'r,* 41 F. (2d) 454, 455; *Kerbaugh,* 29 B. T. A. 1014, 1015, *aff'd* 74 F. (2d) 749.

In order to be guilty of a fraud against the Government the proof of guilt must "exclude every other hypothesis than that of guilt." *Nicola* v. *United States,* 72 F. (2d) 780.

A finding of fraud can not be predicated on conjectures, inferences, suppositions, or ambiguous or equivocal findings. *Lalone* v. *United States,* 164 U. S. 255; *United States* v. *Iron Silver Mining Co.,* 128 U. S. 673. See also the dissenting opinions of Chief Justice Whaley and Judge Littleton in the instant case, at R. 126-130.

Conviction of fraud cannot be based merely on suspicious circumstances. *Terrill* v. *United States,* 35 C. Cls. 218; *Carroll* v. *United States,* 76 C. Cls. 103; *Int. & Great North.*

Ry. Co. v. *United States*, 57 C. Cls. 328, 338; *United States* v. *American Bell Telephone Co.*, 167 U. S. 224, 259; *Ming* v. *Woolfolk*, 116 U. S. 599.

The *Lalone case, supra*, involves a charge of fraud against plaintiff in connection with the securing of a Government pension. There was considerable evidence on both sides as to the cause of plaintiff's injury. The court below found that the preponderance of the evidence supported the fraud charge. The Supreme Court reversed, saying (pp. 257, 260, 261):

> "A mere preponderance of evidence which at the same time is *vague or ambiguous* is not sufficient to warrant a finding of fraud, and will not sustain a judgment based on such findings * * *.
>
> "* * * But even if we were satisfied from the evidence that the accident took place as described by these witnesses, we should still feel that the case on the part of the Government had not been made out with that clearness which is requisite in order to base a finding of fraud * * *.
>
> "* * * The trial court in the opinion delivered by it only went so far as to say that on the whole it was satisfied that the Government had a preponderance of evidence that the pension was obtained fraudulently and that the money paid on it should be recovered back. This mere preponderance, as we have seen, is not sufficient in such a case. The decree in favor of the Government must therefore be reversed * * *. (Italics supplied.)

United States v. *Colorado Anthracite Co.*, 225 U. S. 219, is in point. There one Stoiber filed entry and application on certain Government coal lands. The application was accompanied by an affidavit stating that he was making the entry for his own use. A contest resulted. The land office sustained Stoiber, received his purchase price, and issued allowance of entry to him. The adverse parties appealed

to the Commissioner of the Land Office, who reversed the action below and cancelled the entry. This ruling was affirmed by the Secretary of the Interior.

Stoiber was not seeking to enter the land for himself but for the Colorado company (plaintiff) to which he had already given a quitclaim deed. This fact was not denied or concealed at the hearings, but was admitted and affirmatively shown by Stoiber's witnesses. The plaintiff had furnished the purchase money which Stoiber paid. Stoiber sued for return of the money paid by him. Judgment was against him on the ground that the purchase money had actually been paid by the plaintiff corporation. Thereupon the plaintiff corporation sued for the recovery of the money and the Court of Claims gave it judgment, 45 C. Cls. 614. The Government appealed, claiming that the entry was procured fraudulently and that the purchase price could not be recovered.

The Supreme Court affirmed the Court of Claims and pointed out that the plaintiff had a right to make application for entry in its own name, and that it likewise had the right to do so in the name of another—unless by so doing it was seeking to violate the law limiting the quantity of land any one person could enter; and that it did not appear that by making the entry in the name of Stoiber, it was seeking to violate such law. The Court then said (p. 226):

> "We do not overlook the finding that the application was accompanied by an affidavit stating that Stoiber was making the entry for his own use and benefit, and not directly or indirectly for another. *Of course, the other findings show that that statement was untrue.* Had it remained uncorrected, it probably would have deceived the officers of the land office and prevented any inquiry into the qualifications of the company. *But, according to the findings, it did not remain uncorrected, and could not have deceived the officers, for, at the hear-*

> *ing in the contest which preceded the allowance of the entry, it was admitted and shown that Stoiber was not seeking to acquire the land for himself,* but for the company, to which he already had given a quitclaim deed. *The statement in the affidavit therefore became harmless, for it was upon the evidence given in the contest that the entry was allowed.* It follows that upon the findings it can not be said that the arrangement between Stoiber and the company was forbidden by law, or that the entry was fraudulently procured." (Italics supplied.)

An examination of the opinions in the court below show that the record in this case does not support a conviction of either forgery or fraud by that degree of proof universally required in such cases.

The opinion of two judges is largely predicated upon the assumption of a fact which is diametrically opposed to the findings of fact at R. 96-97. That opinion states that the letter of October 16, 1934, signed by Wrightsman in New York, was prepared by Lea and that the statements therein were deliberately false statements of Lea. That statement was again repeated at R. 98, and appears to be the foundation stone of the opinion. The Record and the Findings totally contradict that statement or assumption. Finding No. 15 (R. 70, 71) states specifically that Lea *did not prepare that letter,* but that Peddy did prepare it. This error is of major importance because of the great stress laid upon it throughout the opinion, and for the reason that that opinion apparently adopts that assumption (totally dehors the record) as the mudsill of the opinion. At no time in this case was Mr. Peddy ever charged with attempting to falsify any record, or to make any statement which was "completely and deliberately false" (as stated in the opinion at R. 97 and 98), yet the authorship of that letter is erroneously attributed to Lea, and upon that error

is predicated the further statement (R. 103) that "This statement is deliberately false and its authorship is unquestioned." As noted, the authorship is unquestioned, but Lea was not the author. Thus it appears clear that the chief argument of that opinion is based upon a premise which is contrary to the fact and contrary to the Court's findings.

The concurring opinion by Judge Jones (R. 104) reasons that the finger points strongly to one of the Company's officials, but admits the difficulty in identifying who that one was; and reasons further that while it does not rise to the dignity of a charge, it does not sink to the level of mere suspicion.

Plaintiff earnestly submits that a charge of forgery, corruption, fraud and forfeiture, should not be sustained where, even though more than a suspicion, it does not rise to the dignity of a charge. The authorities hereinabove cited clearly and unequivocably denounce the upholding of a conviction on such a predicate no matter how well founded a suspicion may be, and cannot support a conviction of corruption and fraud. Such a conviction can never rest on a suspicion. Even though the evidence were preponderate (which is the most that can be claimed herein), that would not be enough.

It is not sufficient to base a conviction upon the predicate that the plaintiff "should have known".

One opinion states that: "The *difficulty* is in identifying the one who is responsible." So long as that *difficulty* exists, and so long as there is *difficulty* in reaching a conclusion, there cannot be a proper conviction of corruption and fraud.

The decision and judgment of the court below is an innovation and is a departure from the established and universally required rule in cases of this character, and it is in conflict with the decisions of this Court, of various Cir-

cuit Courts of Appeals, and with the prior decisions of the Court of Claims. It is contrary to law and to public policy.

This Court should review the decision below.

In closing we would call this Court's attention to the following facts:

1. Plaintiff's claim is a bona fide claim and that fact has not been questioned.

2. Plaintiff's claim was approved and allowed in the Income Tax Unit before any minutes were ever filed. No one disputes this fact.

3. Plaintiff's claim was approved and allowed by the Chief Counsel irrespective of the minutes. This was done after the minutes had been questioned and after full investigation thereof both by the plaintiff and by the Treasury Department. No one disputes this fact.

4. Plaintiff did not rely on the minutes at either time the claims were approved, nor did it rely upon them in its suit in the Court of Claims. Immediately upon question being raised respecting the minutes, plaintiff disclaimed any reliance upon them.

5. The minutes were not essential to the proof of plaintiff's claim. No law or regulation requires them. This is evidenced by the fact that the claim was approved for allowance, without reference to the minutes, both by the Commissioner and by the Chief Counsel, both of whom considered them to be immaterial to plaintiff's case.

Conclusion.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Court of Claims be granted.

J. GILMER KORNER, JR.,
Attorney for Plaintiff.

March, 1943.